In the Matter of Merchant Mariner's Document No. Z-199312-D2 and all other Licenses, Certificates and Documents
Issued to: GERALD W. O'HIGGINS

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

972

GERALD W. O'HIGGINS

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Tittle 46 Code of Federal Regulations Sec. 137.11-1.

By order dated 14 November 1956, an Examiner of the United States Coast Guard at Seattle, Washington, suspended Merchant Mariner's Document No. Z-199312-D2 issued to Appellant upon finding him guilty of misconduct. Nine specifications allege in substance that while serving under authority of the document above described, on various dates between 28 November 1954 and 20 September 1956, Appellant created a disturbance on board ship, he assaulted a member of the ship's crew, Appellant failed to participate in a fire and boat drill on board ship, and he failed to perform his assigned duties on six different dates.

At the hearing on 8 November 1956, Appellant was intoxicated and the Examiner continued the hearing until 1000 on 13 November 1956. Neither the Examiner nor the Investigating Officer was contacted by Appellant between 8 and 14 November. The Examiner noted this fact on 14 November and conducted the hearing in absentia on this date when Appellant still had not been heard from. At the time of original service, Appellant had been given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was not present or represented by counsel on 14 November. The Examiner entered pleas of "not guilty" to the charge and specifications on behalf of Appellant.

The Investigating Officer made his opening statement and introduced in evidence extracts from Shipping Articles and certified copies of logbook entries pertaining to the specifications.

At the end of the hearing on 14 November, the Examiner concluded that the charge and nine specifications had been proved. He then entered the order suspending Appellant's Merchant Mariner's Document No. Z-199312-D2, and all other licenses, certificates and

documents issued to Appellant by the United States Coast Guard or its predecessor authority, for a period of nine months outright and six months on probation until twelve months after the termination of the outright suspension.

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

On 29 and 30 November 1954, Appellant was serving as a deck maintenanceman on board the American SS AIMEE LYKES and acting under authority of his Merchant Mariner's Document No. Z-199312-D2 while the ship was in the port of Rotterdam, Netherlands.

On 29 November 1954, Appellant was absent from his assigned duties for the entire day without permission.

About 1815 on 30 November 1954, Appellant created a disturbance by starting an argument and fight with the ship's Second Electrician. Appellant held the electrician on deck and choked him. Since the Boatswain was unable to disengage Appellant's hands from the electrician's throat, the Boatswain pushed Appellant over the electrician's head. Appellant attempted to keep his hold on the electrician rather than to use his hands to break his fall on deck. Consequently, Appellant was knocked unconscious and sustained two deep scalp wounds when his head struck some fitting on the deck. Appellant was hospitalized and permanently removed from the ship.

From 18 to 21 July 1955, inclusive, Appellant was serving as an able seaman on board the American SS EMPIRE STATE and acting under the authority of the above document. The ship was at Yokohama, Japan, on 18 July and at Kobe, Japan, on 21 July.

On 18 July 1955, Appellant failed to report on board to perform his assigned duties.

On the morning of 21 July 1955, Appellant failed to turn to and secure the vessel for sea prior to getting underway. On this date, Appellant also failed to stand his 1200 to 1600 watch.

On a voyage including the dates of 16 August and 19 September 1956, Appellant was serving as an able seaman on board the American SS CHIAN TRADER and acting under the authority of the above document.On 16 August, the ship was in the port of Portland, Oregon, and, on 19 September, she was at Pusan, Korea.

At 1030 on 16 August 1956, Appellant failed to participate in a fire and boat drill which was conducted on the ship. During the

remainder of the day, Appellant failed to turn to and perform his assigned duties.

On 19 September 1956, Appellant failed to perform his assigned duties although he was on board the ship.

On some of the above dates, Appellant was in a condition of intoxication.

Appellant's prior record consists of an admonition and probationary suspension in 1944 as well as probationary suspension in 1951 for desertion, refusal to obey an order of the ship's Master, the use of abusive language to a superior officer and inability to perform his duties due to intoxication.

BASIS OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant contends that the Examiner erred in holding the hearing without informing Appellant on the date and time of the hearing. It is also urged that there is not sufficient or competent evidence to support the findings with respect to most of the specifications and appellant possesses evidence which refutes the allegations contained in such specifications.

APPEARANCE ON APPEAL: Joseph S. Kane, Esquire, of Seattle, Washington, of Counsel.

OPINION

It is my opinion that it was not error for the Examiner to conduct the hearing in absentia on 14 November 1956. Title 46 CFR 137.09-5(f) states that the hearing shall proceed in any case when the person charged fails to appear after having been duly served with notice of the hearing. Hence, the issue is whether Appellant had received appropriate notice by which he was required to attend the hearing at a later date than 8 November 1956.

The record shows that, on 8 November, the Examiner advised Appellant three times as to the date when the hearing would be reconvened and the hearing proceed whether Appellant was present or not (R. 8, 10, 11). Presumably, this was adequate notice to Appellant since he should have been able to remember the date of 13 November in view of the fact that he was able to remember to be present at the hearing on 8 November despite his intoxicated condition. But if Appellant's contention on appeal is intended to mean that he was to intoxicated on 8 November to remember having been told that the hearing was continued until 13 November, the answer seems to be that Appellant was given "due notice" within the

meaning applied to these words by the Supreme Court.

In the case of Elgin, Joliet and Eastern Railway Co. v. Burley et al. (1946), 327 U.S. 661, it was stated that due notice of hearings required at least knowledge, on the part of the party, of the pendency of the proceedings of knowledge of such facts as would be sufficient to put him on notice of their pendency. Appellant herein knew or should have know that the hearing was still pending because it had not been completed on 8 November, as scheduled, due to his voluntary intoxication. Thereafter, the burden was on Appellant to take affirmative steps to determine the status of the pending case by contacting the Examiner, the Investigating Officer or other Coast Guard official Seattle. (Probably any attempt to get in touch with Appellant would not have been successful because his home address is given as New York City.) If this had been done, the status of Appellant's case would have been revealed to him immediately either through the recollection of the person contacted or, if necessary, a transcription of the record of the public hearing conducted on 8 November.

Undoubtedly, it would have been preferable for the Examiner to have given Appellant written notice of the continuance until 13 November. Nevertheless, it is too late for Appellant to raise this contention on appeal after having failed to take any action during the six days between 8 and 14 November, inclusive, after the hearing had been postponed through Appellant's fault. Appellant was given adequate opportunity to be present and submit evidence in his defense but he failed to do so. Hence, the contention that the Examiner erred in conducting the hearing in absentia is without merit. The notice of hearing was in accordance with 46 CFR 137.09-5(f), supra, and the Administrative Procedure Act which states that a person entitled to notice of hearing shall be "timely informed" of the time, place and nature thereof (5 U.S.C. 1004(a).

The documentary evidence taken from the Shipping Articles and Official Logbooks of the three vessels on which Appellant was serving on the various dates in question constitutes competent, substantial evidence which is sufficient to make out a prima facie case in support of the allegations contained in the nine specifications. The logbook entries were made in compliance with the statutory requirements contained in 46 U.S.C. 702.

In the light of the foregoing discussion, it is apparent that Appellant has forfeited his right to submit evidence which he possess - the nature of which he does not specify.

I agree with the Examiner's statement that Appellant's irresponsible conduct not only causes hardships for other members of the crews on ships where Appellant is employed but that such

conduct could, under certain circumstances, render a vessel unseaworthy. The order of suspension imposed was entirely justified and it will be sustained.

ORDER

The order of the Examiner dated at Seattle, Washington, on 14 November 1956, is AFFIRMED.

J. A. Hirshfield
Rear Admiral, United States Coast Guard
Acting Commandant

Dated at Washington, D. C., this 2nd day of July, 1957.